required, before access to the courts is possible. And while cases are pending in administrative review or proceedings, no statute of limitations ever runs. In the exceptional case of Sec. 9 of the Trading with the Enemy Act, filing of a Notice of Claim is required but resort to the courts can be had even in absence of an administrative decision.[3]

Were it not for this anomaly, the question of tolling the running of the statute could not have arisen.

Because of this universally accepted principle, none of the claimants will feel endangered by a statute of limitations or its interpretation contrary to common understanding. These claimants, whose patience is sorely taxed in any case as it takes the Office of Alien Property several years to even commence processing a claim, would be severely shocked by their loss of the right to enforce their claim, occurring as it would in spite of a pending administrative proceeding. Such decision would cast the most serious doubts on the administration of justice in the United States in their minds. This is the more deplorable since the affected groups of claimants are composed of persons of allied or neutral nationality, American citizens or domiciliaries, or persecutees, all of whom constitute the very groups to whom the legislature felt bound to grant a positive right of return.

(3) The situation is further aggravated by a curious and fallacious policy decision on the part of the Office of Alien Property suspending Sec. 9(a) returns, or even denying its own jurisdiction to make administrative returns under Sec. 9(a) of the Act.

Sec. 9(a) of the Act confers upon the President the

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[3] *McGrath* v. *Manufacturers Trust Co.*, 338 U. S. 241 (247 note 8), 94 L. ed. ....., 70 Sup. Ct. 4; *Stoehr* v. *Wallace*, 255 U. S. 239, 65 L. ed. 604, 41 Sup. Ct. 293; *Central* v. *Garvan*, 254 U. S. 554, 65 L. ed. 403, 41 Sup. Ct. 214.

power to make administrative returns to non-enemies. The President's powers under the Act were delegated to the Attorney General.[4] In the face of the clear wording of the law, the Office of Alien Property contends that its authority to make administrative returns under Sec. 9(a) of the Act is doubtful, and has, therefore, withheld action on such claims temporarily.[5] Later, proceedings were established for returns under Sec. 32 of the Act,[6] which returns, however, are not a matter of right, but of discretion, and the provisions for which do not encompass all persons eligible under Sec. 9(a). Action on administrative returns under Sec. 9(a) claims still is not being taken.[7] That the Office of Alien Property has the power to make returns under Sec. 9(a) is evident from footnote 8 of the decision of the United States Supreme Court, Mr. Justice Burton, in *McGrath* v. *Manufacturers Trust Co.*[8], where the following is said:

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[4] Executive Order No. 9788 of Oct. 14, 1946, 11 F. R. 11 981; Executive Order No. 9989 of Aug. 20, 1948, 13 F. R. 4891; 1947 Reorganization Plan 1, Sec. III, 12 F. R. 4534;

[5] Annual report, Office of Alien Property Custodian for the fiscal year ending June 30, 1945, p. 162.

[6] Annual Report, Office of Alien Property, fiscal year ending June 1947, p. 82.

[7] Hearing Examiner's decision in the matter of Albrecht Behrens, Title Claim No. 45796, Docket No. 688, wherein he said:

> "Even so, argues claimant's counsel, the claim is also based on section 9(a) of the Act, and the Hearing Examiner should rule that the notice of claim is or is not demurrable under the provisions of section 9(a) also. I decline so to rule. Instead, I rule that there has been delegated to the Hearing Examiners authority to consider claims for the return of property based on section 32 only. Authority to consider claims based on section 9 has not been delegated to the Hearing Examiners. See the "National Interest Determination" issued September 23, 1949, by the then Director in Matter of Erich Lachman, Claim No. 1199, Docket No. 132."

[8] See note 3, *supra.*

"Section 9(a) of the Act, 42 Stat. 1511, 50 U. S. C. App. § 9 (a), 50 U. S. C. A. Appendix § 9(a) provides for the administrative consideration and allowance of claims to property transferred to the Custodian. A claimant also may sue in a District Court for an adjudication of the validity of his claim. Section 32, 60 Stat. 50, as amended, 60 Stat. 930, 50 U. S. C. App. § 32, 50 U. S. C. A. Appendix, § 32, authorizes the administrative recognition of claims to property in the possession of the Custodian and § 34, 60 Stat. 925, 50 U. S. C. App. § 34, 50 U. S. C. A. Appendix, § 34, authorizes a procedure for the allowance, and payment to claimants, of debts owed by the person whose property has been seized by the Custodian. See also, Central Union Trust Co. of New York v. Garvan, 254 U. S. 554, 568, 41 S. Ct. 214, 215, 65 L. Ed. 403; Garvan v. $20,000 Bonds, 2 Cir. 265 F. 477; Simon v. Miller, D. C. S. D. N. Y., 298 F. 520, 524; Kahn v. Garvan, D. C. S. D. N. Y., 263 F. 909, 916."

Thus, these thousands of claimants believe that they have done everything that is necessary after having filed Notices of Claim, as indeed they are entitled to think from the face of the statute. They have no knowledge, actual or constructive, of the unpublished administrative decisions by Hearing Examiners. And even if they had such knowledge, they usually live in countries with foreign funds control regulations making it impossible for them to pay the fees and expenses for suits, their dollar funds being unavailable by virtue of the very vesting orders they are trying to combat. Gravely concerned and damaged by the insufferable delay of this arbitrarily suspended administrative procedure, blissfully unaware of the fact that the cards are stacked against them, they wait for administrative return that will never be forthcoming.

As a matter of fact, the administrative decision denying jurisdiction for Sec. 9(a) returns, together with the decision below, holding that the filing of a Notice of Claim

during the alternate period does not toll the running of the statute of limitations for instituting suit, constitute a trap, the existence of which gravely affects the regard in which American administration of justice is held abroad.

B.

Failure to Give Proper Effect to Applicable Decisions.

While the United States Supreme Court has not decided the direct point in question, a number of its decisions have settled most of the points of law at issue. Petitioners feel constrained to maintain that the United States Court of Appeals has failed to give proper effect to these decisions:

(1) *Markham* v. *Cabell.*[9]

(a) In the case of *Markham* v. *Cabell, supra,* the United States Supreme Court said, speaking through Mr. Justice Douglas:

> "Yet the remedy afforded by Sec. 9(a) would be quite illusory and ineffective so far as it applies to World War II claims if Sec. 9(e) were read literally and without regard to its history . . . The policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes as Holy Trinity Church v. United States, 143 US. 457, 12 S. Ct. 511, 36 L. Ed. 226, illustrates. The process of interpretation also misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve."

The same statute is involved. Interpretation negativing tolling of the statute of limitations by Notice of Claim, coupled with the contention that there is no dele-

[9] *Markham* v. *Cabell,* 326 U. S. 404, 90 L. ed. 165, 66 Sup. Ct. 193.

gation of power for administrative return in Sec. 9(a) cases, indeed would emasculate Sec. 9(a) almost as effectively as would have Sec. 9(e), if the United States Supreme Court had not read it out of the law. Thus, it is contended that the court below has failed to give proper effect to the decision in *Markham* v. *Cabell.*

(b) In the same case, this Court said:

> "The right to sue, explicitly granted by Section 9(a), should not be read out of the law unless it is clear that Congress by what it later did withdrew its earlier permission."

What applies to a right to sue, once granted, applies also to a right to toll the running of a statute of limitations.

A somewhat similar set of facts was decided in *Posadas* v. *National City Bank*[10] where Justice Sutherland said:

> "And, even in the face of a repealing clause, circumstances may justify the conclusion that a later act repeating provisions of an earlier one is a continuation, rather than an abrogation and reenactment, of the earlier act. Bear Lake Irrigation Co. v. Garland, 164 U. S. 1, 11-13, 17 S. Ct. 7, 41 L. Ed. 327.

While it might look as if Congress had partly repealed the tolling proviso by amendment, it is submitted that Congress merely extended the statute of limitation, leaving untouched the principle of tolling the running of the statute by filing of Notices of Claim.

(2) *United States* v. *Congress of Industrial Organizations.*[11]

Following an established canon of statutory construction, the United States Supreme Court said in *United*

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[10] Posadas v. National City Bank, 296 U. S. 497, 80 L. ed. 351, 56 Sup. Ct. 349.

[11] United States v. Congress of Industrial Organizations, 355 U. S. 106, 92 L. ed. 1849, 68 Sup. Ct. 1349.

States v. *Congress of Industrial Organizations, supra,* speaking through Mr. Justice Reed:

> "The purpose of Congress is a dominant factor in determining meaning. There is no better key to a difficult problem of statutory construction than the law from which the challenged statute emerged. Remedial laws are to be interpreted in the light of previous experience and prior enactments. Nor, where doubt exists, should we disregard informed congressional discussion."

When the tolling provision was first enacted, the Reports of both Houses[12] accompanying the Bill stated:

> "In computing the 2-year period, however, *fairness requires that there be excluded any period during which a claim for return has been pending* pursuant to section 9(a) or section 32, or any period during which a suit has been pending pursuant to section 9(a)." (Emphasis supplied).

There is no indication that the congressional concept of fairness had changed by the time Section 33 was amended.

The amendment of Section 33 of the Trading With the Enemy Act by which the alternate period was extended to April 30, 1949, in lieu of the two-year period from the enactment of the original section (two years from August 8, 1946) was initiated by the Department of Justice.[13] It stated—and so did the Committees of the Senate[14] and the House[15]—as the purposes of the bill the extension of time for filing claims and suits for return.

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[12] House Report No. 2398, 79th Congress, 2nd Session, pertinent part reprinted in Annex I. Senate Report No. 1839, 79th Congress, 2nd Session, pertinent part reprinted in Annex II.

[13] See letter of March 25, 1948 printed in Annex III.

[14] Senate Report No. 1532 to accompany H. R. 6116, reprinted in Annex IV.

The court below ruled impliedly that by this amendment, the tolling effect of filing Notice of Claim during the alternate period is to be read out of the statute.

But the House[15] and Senate Reports[14] and all other parts of the Congressional Record show not even the mere mentioning of a desire on the part of any person whatever to abrogate, modify or change the tolling proviso; the purpose of Congress was extension of time in favor of claimants, not the imposition of any restrictions or limitations upon the right to sue.

The congressional intent is further evident from the general history of Trading with the Enemy Act legislation.

The elimination or emasculation of the right to sue granted by Section 9(a) of the Trading With the Enemy Act has for years been the subject of efforts by the Alien Property Custodian and the Office of Alien Property. These efforts were forestalled by Congress and the courts again and again, only to reappear in different forms. The interpretation as placed upon the statute by the court below would eliminate most claimants from the benefits of Section 9(a) of the Act.

First, Bill H.R. 4840, 78th Congress, 2nd Session, died in Committee.[24] Then, it was attempted to render Section 9(a) ineffectual by the contention that Section 9(e) preclude all suits in cases arising from World War II. This attempt ended in defeat before the United States Supreme Court in the case of *Markham* v. *Cabell*.[16] The next attempt was the contention that the enactment of Section 5(b) of the Act had impliedly repealed the consent to be sued. This attempt was foiled by the decision

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[15] House Report No. 1843 to accompany H. R. 6116, reprinted in Annex III.

[16] Note 9, *supra*.

of the court below in *Uebersee-Finanz Korporation* v. *Markham*,[17] affirmed by the United States Supreme Court. In this opinion, Mr. Chief Justice Groner took exception to these repeated attempts. Meanwhile another legislative attempt at elimination of Section 9(a) failed.[18]

The next attempt at elimination of Section 9(a) was contained in H.R. 1823, 80th Congress, 1st Session.[19] It failed. Bill H.R. 2823, 80th Congress, 1st Session, constituting another such attempt, also failed.

Now, the construction placed upon Section 33 of the Act is to accomplish the same purpose.

Petitioners submit that in the light of the clear *ratio legis* the court below failed to give effect to the decisions of the United States Supreme Court incorporated in *United States* v. *Congress of Industrial Organizations*, *supra*.

(3) *United States* v. *Katz*[20]

In *United States* v. *Katz*, Mr. Justice Stone said:

> "All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."

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[17] 81 App. D. C. 284, 158 F. (2d) 313, aff'd Clark v. Uebersee Finanz-Korporation, 332 U. S. 480, 92 L. ed. 88, 68 Sup. Ct. 174.

[18] By H. R. 5089 and S. 2378, 79th Congress, 2nd Session. The Bill was enacted but under elimination of the proviso concerning Sec. 9(a).

[19] A bill to establish an Enemy Alien Commission. Hearings held before the Committee on Interstate and Foreign Commerce, House of Representatives, 80th Congress, 1st Session, on H. R. 873, 1823, 1000 and 2823, on March 20, 21, and April 21, 1947.

[20] 271 U. S. 354, 70 L. ed. 986, 46 Sup. Ct. 513.

The general portent of this decision has been reaffirmed in a consistent line of decisions.[21]

To hold that Notices of Claim filed during the first (two-year) period should have the effect of tolling the statute and the same Notices of Claim, when filed during the alternate period should have no such effect, is absurd. There is no conceivable differentiation justifying such different treatment. In fact, the inquiry may be justified whether such interpretation would not run afoul of the equal protection clause of the Constitution. In any case, petitioners submit that the court below has adopted an absurd interpretation in contradiction to decisions of the United States Supreme Court.

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[21] *Lawson* v. *Sunanee*, 336 U. S. 198, 93 L. ed. 611, 69 Sup. Ct. 503; *Vermilya-Brown* v. *Connell*, 335 U. S. 377, 92 L. ed. 1139, 69 Sup. Ct. 140; *Shapiro* v. *United States*, 335 U. S. 1, 92 L. ed. 1787, 68 Sup. Ct. 1375; *Haggar* v. *Helvering*, 308 U. S. 389, 84 L. ed. 340, 60 Sup. Ct. 337; *United States* v. *Raynor*, 302 U. S. 540, 82 L. ed. 413, 58 Sup. Ct. 353; *United States* v. *Chase Security*, 277 U. S. 600, 72 L. ed. 1008, 48 Sup. Ct. 561.

CONCLUSION

The case at bar is of major importance to thousands of eligible claimants. The United States Supreme Court has not decided a case directly in point. Furthermore, several decisions of the United States Supreme Court have not been given proper effect by the United States Court of Appeals for the District of Columbia Circuit. It is, therefore, respectfully suggested that the question at bar should be settled by the United States Supreme Court.

WHEREFORE petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above entitled cause entered on October 5, 1951.

Respectfully submitted,

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981558—52

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 455

HANS KROCH, ET AL., PETITIONERS

v.

J. HOWARD MCGRATH, AS ATTORNEY GENERAL OF THE UNITED STATES, AND GEORGIA NEESE CLARK, AS TREASURER OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court (R. 22) is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 35) is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered October 5, 1951 (R. 36). The petition

for a writ of certiorari was filed November 30, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

STATUTE INVOLVED

Section 33 of the Trading With the Enemy Act (added by the Act of August 8, 1946, 60 Stat. 925, and amended by the Act of July 1, 1948, 62 Stat. 1218, 50 U. S. C. App., Supp. IV, 33) is set out in the Appendix, *infra*, p. 6.

QUESTION PRESENTED

Whether Section 33 of the Trading With the Enemy Act bars a suit for return of vested property where the suit was filed after April 30, 1949, and where no suit or administrative claim was filed within two years after the date of vesting.

STATEMENT

Petitioners' suit, filed May 11, 1949, was brought under Section 9 (a) of the Trading With the Enemy Act (40 Stat. 419, 50 U. S. C. App. § 9 (a)) to recover certain shares of stock vested pursuant to Section 5 (b) of the Act as belonging to a national of Germany. The amended complaint (R. 3) alleges, *inter alia,* that petitioners are stateless, and not enemies or allies of enemies, and before the war had been owners of the shares, but that because one of the petitioners was Jewish their shares had been taken from them by the German government and sold to others, from

whom the Custodian vested. This petition seeks review only with respect to property vested December 28, 1942 (Vesting Order 352, 7 F. R. 11033) as to which petitioners filed a timely notice of claim on August 29, 1947.[1] Respondent moved for summary judgment (R. 13) on the ground, *inter alia,* that the action was barred by the applicable statute of limitations, Section 33 of the Trading With the Enemy Act. The District Court granted the motion (R. 23) and the Court of Appeals affirmed (R. 35) on the authority of *Pass* v. *McGrath,* decided the same day (petition for certiorari pending, No. 437).

ARGUMENT

The application of Section 33 to the facts of this case is clear. The property was vested in 1942, the claim was filed in 1947, and the suit was instituted May 11, 1949. As no suit or claim was filed within two years of vesting, Section 33 provides that the last day on which suit could be brought was April 30, 1949. Accordingly, the question presented by this petition is the same as that in *Pass* v. *McGrath,* petition for certiorari pending, No. 437, this Term. We respectfully refer the Court to our Brief in Opposition filed in that case for our argument.

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[1] In the courts below, petitioners also sought to recover property vested February 26, 1947 (Vesting Order 8134, 12 F. R. 1405). As to that claim, the District Court (R. 22) held that petitioners had not shown sufficient interest and no review is being sought of that question.

Petitioners here make the additional argument (Pet., pp. 8–11) that thousands of claimants[2] who filed notices of claims under § 9 (a) prior to the enactment of § 32 in 1946 will never get an administrative return because administrative returns are no longer made under § 9 (a). The argument rests upon a mistaken assumption of fact. All claims filed with the Office of Alien Property are processed as filed. For administrative reasons, all title claims (including those filed under Section 9 (a))[3] are initially processed under § 32, since that section permits return in many cases in which § 9 (a) does not. Disallowance of a claim under § 32 normally operates also as a disallowance under § 9 (a). (Regulations, Office of Alien Property, 8 C. F. R. §§ 501.4 and 501.5). Should a case arise in which a claim, although disallowed under § 32, was allowable administratively under § 9 (a), the Director of the Office of Alien Property could allow it as a general claim. (Office of Alien Property, 8 C. F. R. § 502.300).[4] In any event, any claimant

[2] As in *Pass* v. *McGrath*, petitioners continually suggest but fail to give any factual basis for the assertion that there are thousands of claimants adversely affected.

[3] See 11 Fed. Reg. 177A–628 (Part II of Vol. 177, Sept. 11, 1946) § 501–60, Form APC–1.

[4] The administrative decisions referred to by petitioner (Pet., p. 9, n. 7) merely state that jurisdiction to pass upon questions under § 9 (a) has not been delegated to hearing examiners in the Office of Alien Property.

Probably the only case in which a claim, disallowed under § 32, might be allowed under § 9 (a) would be one in which

is free to sue under § 9 (a) the instant after his administrative claim is filed.

CONCLUSION

For the reasons stated herein and in the Brief in Opposition filed in *Pass* v. *McGrath*, No. 437, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1952.

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allowance under § 32 was found contrary to the national interest (§ 32 (a) (5)). Section 9 (a) contains no national interest requirement. Such a case might also arise should this Court reject the Government's position in the *Nagano* and *Gwasseldt* cases, Nos. 169 and 204, argued November 29, 1951, in the case of an enemy citizen who was found to be present in, but not resident in, enemy territory.

APPENDIX

Section 33 of the Trading With the Enemy Act, added by the Act of August 8, 1946, 60 Stat. 925, and amended by the Act of July 1, 1948, 62 Stat. 1218, 50 U. S. C. App., Supp. IV, 33, provides:

> No return may be made pursuant to section 9 or 32 unless notice of claim has been filed: (a) in the case of any property or interest acquired by the United States prior to December 18, 1941, by August 9, 1948; or (b) in the case of any property or interest acquired by the United States on or after December 18, 1941, by April 30, 1949, or two years from the vesting of the property or interest in respect of which the claim is made, whichever is later. No suit pursuant to section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32 (a) hereof.

U. S. GOVERNMENT PRINTING OFFICE: 1952